CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK; PART BTP1

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RACHAEL WELDON, ESTHER ROBINSON, and REBEKAH SCHILLER

Defendants.

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Docket Nos.
2012NY073843
2012NY073882
2012NY073884

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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Defendants RACHAEL WELDON, ESTHER ROBINSON, and REBEKAH SCHILLER submit this memorandum of law in support of their motion to dismiss the charge that they violated Penal Law § 240.35(4). This law is unconstitutional as applied to Defendants because it impermissibly burdens their First Amendment Rights of symbolic speech under the United States Constitution and the free speech provision of the New York State Constitution; therefore, the charge should be dismissed.[1]

PRELIMINARY STATEMENT

On August 17, 2012, Rachael Weldon, Esther Robinson, and Rebekah Schiller ("Defendants") were demonstrating in front of the Russian Consulate on the Upper East Side of Manhattan as part of the day of planned global demonstrations in solidarity with the feminist Russian punk protest band Pussy Riot. On that day, three members of the band were sentenced to two years in prison on charges of hooliganism motivated by religious hatred, and demonstrators in many countries staged protests in support of the band's politics and in opposition to the anticipated unjust sentence.

Pussy Riot are recognized internationally by their brightly colored ski masks—called balaclavas—and Defendants were wearing these masks as an expression of their solidarity with Pussy Riot.

Defendants were arrested for violating Penal Law § 240.35(4), New York's "anti-mask" law, which makes it a crime for three or more people to remain in public in a mask, unless it is "in connection with a masquerade party or like entertainment."

Defendants are challenging the constitutionality of this law "as applied" to them; they are not making a facial constitutional challenge. Conduct (such as wearing a mask) is protected by

[1] Defendants were also charged with two Disorderly Conduct violations, Penal Law §§ 240.20(5) and 240.20(6). Defendants' Motion to Dismiss does not address these charges.

the First Amendment if it conveys a "particularized message" and the likelihood is great that the message would be understood by those who viewed it. The balaclava is the trademark or defining symbol of Pussy Riot and integral to their substantive message advocating gender equality, political engagement, and protest against the repressive Russian government. Very significantly, and in contrast to a Second Circuit case challenging New York's anti-mask law, the mask itself is not "redundant" of the message the clothing conveys; rather it "adds . . . expressive force" to the message, and increases the likelihood that members of the public who see the masked demonstrators will understand their message. Thus, wearing a balaclava meets the test for conduct protected by the First Amendment because it conveys a particularized message of support for Pussy Riot and the likelihood is great that viewers will understand this message.

Moreover, numerous Supreme Court and Second Circuit decisions emphasize that the context is integral to determining whether conduct meets the test for First Amendment protection. Here, Defendants wore the mask in front of the Russian Consulate on the day the three Pussy Riot members were convicted and sentenced and on which there were worldwide protests in support of the band. This context adds further support to Defendants' argument that the balaclava conveys a particularized message of support for Pussy Riot and the likelihood is great that viewers will understand the message.

Once a court determines that conduct is protected by the First Amendment, it must then determine whether the regulation in question impermissibly burdens the claimant's rights. Here, New York's anti-mask law impermissibly burdens Defendants' rights. When the government's asserted interest is not implicated by the facts on the record, there is no justification for the restriction on the claimant's First Amendment rights, and, thus, the regulation, as applied,

impermissibly burdens these rights. This situation applies to Defendants: the government's interest in enforcing Penal Law § 240.35(4)—deterring violence and facilitating the apprehension of wrongdoers—was in no way implicated by Defendants' conduct (peaceful political protest). If, on the other hand, the Court determines that the government's interest is in fact implicated by the facts on the record, it may apply the four-prong test from *United States v. O'Brien*, 391 U.S. 367 (1968) for determining whether a regulation impermissibly burdens protected symbolic expression. The fourth prong of this test requires that the regulation be "no greater than essential to the furtherance of [the government's] interest." New York's anti-mask law—when applied to Defendants' conduct—fails this fourth prong of the *O'Brien* test, and, thus, fails the test.

In sum, Defendants' conduct constitutes symbolic speech that is protected by the First and Fourteenth Amendments to the U.S. Constitution, and New York's anti-mask law, as applied to Defendants, impermissibly burdens this right.

In addition, prohibiting Defendants' from wearing the mask in this instance violates the free speech provision (Article I, § 8) of the New York State Constitution. Notably, the New York State Constitution provides greater protection for free speech than the U.S. Constitution. Defendants' wearing of the mask in this instance meets the test for conduct that is protected under the New York State Constitution, and applying the anti-mask law to Defendants' conduct is "broader than necessary" to achieve the government's goal of crime prevention and detection. Thus, applying the anti-mask law to Defendants violates their free speech rights under the New York State Constitution.

FACTS

A. Background on Pussy Riot

Pussy Riot is a feminist punk protest band or collective based in Moscow that formed in October 2010.[2] It consists of approximately 10 performers and 15 people who handle the technical work of shooting and editing the band's videos.[3] The performers wear brightly colored ski masks—called balaclavas—and stage unauthorized, provocative guerrilla performances in public locations. These performances are filmed and edited into music videos and posted on the Internet.[4] The band advocates feminist and anti-homophobic principles, political activism, and protests against the Russian government's repression of free expression and other political liberties.[5] The members did not start as performers, but believed that punk protests would be a good way to further their message and formed the band for this reason.[6]

On February 21, 2012, four members of the group staged a 40-second performance in Moscow's Russian Orthodox cathedral.[7] Wearing their trademark balaclavas, they danced and

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[2] *See* Miriam Elder, *Pussy Riot Trial: 'We are representatives of our generation,'* THE GUARDIAN, August 17, 2012, http://www.guardian.co.uk/world/2012/aug/17/pussy-riot-trial-representatives-generation.

[3] *See* Corey Flintoff, *In Russia, Punk-Rock Riot Girls Rage Against Putin*, NPR, Feb 8, 2011, http://www.npr.org/2012/02/08/146581790/in-russia-punk-rock-riot-girls-rage-against-putin.

[4] *See* YouTube.com, Pussy Riot User Page, http://www.youtube.com/user/PussRiot (last visited November 19, 2012); *see also* Henry Langston, *Meeting Pussy Riot*, VICE, March 2012, http://www.vice.com/read/A-Russian-Pussy-Riot.

[5] *See* Corey Flintoff, *In Russia, Punk-Rock Riot Girls Rage Against Putin*, NPR, Feb 8, 2011, http://www.npr.org/2012/02/08/146581790/in-russia-punk-rock-riot-girls-rage-against-putin; Pussy Riot's feminist and anti-homophobic principles are demonstrated by their statements in interviews and their lyrics. *See* Henry Langston, *Meeting Pussy Riot*, VICE, March 2012, http://www.vice.com/read/A-Russian-Pussy-Riot ("...themes that are important to us: gender and LGBT rights, problems of masculine conformity, absence of a daring political message on the musical and art scenes, and the domination of males in all areas of public discouse.") ("Sexists have certain ideas about how a woman should behave, and Putin, by the way, also has a couple thoughts on how Russians should live, Fights against all that – that's Pussy Riot."). Examples of Pussy Riot song lyrics include: "Virgin Mary, Mother of God, become a feminist. Become a feminist, become a feminist." "Direct action – the future of mankind! LGBT, feminists, defend the nation!" and "The fucking end to sexist putinists!" www.FreePussyRiot.org, *Lyrics of Songs of Pussy Riot*, http://freepussyriot.org/content/lyrics-songs-pussy-riot (last visited November 20, 2012). *See also* Point II.A.2.ii and articles cited therein.

[6] *See* Corey Flintoff, *In Russia, Punk-Rock Riot Girls Rage Against Putin*, NPR, Feb 8, 2011, http://www.npr.org/2012/02/08/146581790/in-russia-punk-rock-riot-girls-rage-against-putin.

[7] Human Rights Watch, *Russia: Justice Fails at Pussy Riot Appeal,* October 10, 2012, http://www.hrw.org/news/2012/10/10/russia-justice-fails-pussy-riot-appeal.

shouted the words to their song "Virgin Mary, Get Putin out."[8] Though their performance was stopped by officials in less than a minute, a video of the performance was released to social media the same day.[9] The band members said this performance aimed to criticize Putin, the Church for supporting Putin,[10] and conservative approaches towards women's equality and rights for members of the lesbian, gay, bisexual and transgendered ("LGBT") communuity.[11]

In March 2012, three members of the collective, Maria Alekhina, Nadezhda Tolokonnikova, and Ekaterina Samucevich were arrested and imprisoned for this performance.[12] They were charged with hooliganism motivated by religious hatred.[13] On August 17, 2012, each of the three members was convicted of this charge and sentenced to two years' in prison.[14]

The arrest and trial of these three women drew worldwide attention, including many front-page articles in the New York Times and other publications.[15] The New York Times has referred to them as an "international sensation,"[16] and the band has received support from dozens of celebrities (Wikipedia listed more than 50),[17] including Madonna, Sting, Paul McCartney, Yoko Ono, Anthony Kiedis of the Red Hot Chili Peppers, and Chloe Sevigny.[18] On August 17—

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[8] *Id.*
[9] *Id.*
[10] David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, August 17, 2012, at A1, *available at* http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html.
[11] *See* Human Rights Watch, *Russia: Justice Fails at Pussy Riot Appeal,* October 10, 2012,
[12] *Id.*
[13] *Id.*
[14] *See* David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, August 17, 2012, at A1, *available at* http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html.
[15] *Id.*
[16] David M. Herszenhorn, *Russia: Band's Appeal Postponed*, N.Y. TIMES, October 1, 2012, at A11, *available at* http://www.nytimes.com/2012/10/02/world/europe/pussy-riot-hearing-is-postponed-by-moscow-court.html.
[17] *See* Pussy Riot, Wikipedia, http://en.wikipedia.org/wiki/Pussy_Riot#cite_note-RAPSI_Sam-8 (last visited Nov. 20).
[18] *See* David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, August 17, 2012, at A1, *available at* http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html; *see also* Melena Ryzik, *Carefully Calibrated For Protest*, N.Y. TIMES, August 26, 2012, at AR1, *available at* http://www.nytimes.com/2012/08/26/arts/music/pussy-riot-was-carefully-calibrated-for-protest.html?adxnnl=1&adxnnlx=1352934350-TdD2Rp97bOubV3K0Tw8j9g. *See also* Michael Schwirtz,

the day the three women were convicted and sentenced and the day Defendants were arrested—rallies in support of Pussy Riot were held in dozens of cities.[19]

B. Defendants' Actions on August 17, 2012

At approximately 10:30 a.m. on August 17, 2012, the day the three Pussy Riot members were convicted and sentenced, Defendants were demonstrating in front of the Russian Consulate on east 91st Street, between Madison and Fifth Avenues as part of the day of planned global demonstrations in solidarity with Pussy Riot and its three arrested members. Defendants were allegedly demonstrating with approximately 25 other persons. (*See* Crim. Ct. Compl.). Defendants were wearing brightly colored masks to demonstrate their support for Pussy Riot. Others at the demonstration were wearing masks in addition to Defendants (*See* Crim. Ct. Compl.).

After Sargent Solcany, a member of the New York Police Department ("NYPD"), allegedly used a bullhorn to warn the crowd to disperse and move away from the Russian Consulate, the demonstrators, including Defendants, moved across the street to the opposite sidewalk . (*See* Crim. Ct. Compl.). Sargent Solcany allegedly then asked the demonstrators to disperse again, and the demonstrators, including Defendants, allegedly refused (*See* Crim. Ct. Compl.).

Musicians Voice Support for Jailed Russian Punk Group, , N.Y. TIMES, July 31, 2012, *available at http://thelede.blogs.nytimes.com/2012/07/31/musicians-voice-support-for-jailed-russian-punk-group/.*

[19] *See* FreePussyRiot.org, *Global Day of Solidarity for Pussy Riot*, August 18, 2012, http://freepussyriot.org/en/actions On October 10, following an appeal, one of the members, Samutsevich was freed on probation, her sentence suspended. *See* David M. Herszenhorn & Andrew Roth, *Moscow Court Frees One Member of Punk Protest Band*, N.Y. TIMES, October 11, 2012, at A10, *available at* http://www.nytimes.com/2012/10/11/world/europe/one-member-of-pussy-riot-is-freed-by-moscow-court.html.The sentences of the other two women were upheld. *See id.* On Oct 22, the group announced that that the two remaining jailed members, Alyokhina and Tolokonnikova were separated and sent to prison camps far away from their children, where temperatures can fall as low as 50 degrees in the winter. *See* Robert Mackey, *Pussy Riot Protesters Sent to Prison Camps*, N.Y. TIMES, October 22, 2012, *available at* http://thelede.blogs.nytimes.com/2012/10/22/pussy-riot-protesters-sent-to-penal-colonies/.

Allegedly, Sargent Solcany, over a bullhorn, told the crowd to remove their masks. (*See* Crim. Ct. Compl.). Though other demonstrators complied and removed their masks, Defendants believed the request infringed on their First Amendment rights to peaceful political protest and refused (*See* Crim. Ct. Compl.). Defendants were subsequently charged with violating Penal Law § 240.35(4), in addition to two other charges that this memorandum of law does not address (Penal Law § 240.20(5), obstructing pedestrian traffic and Penal Law § 240.20(6), refusal to comply with a lawful order to disperse). (*See* Crim. Ct. Compl.).

RELEVANT STATUTORY PROVISION

Under New York law, a person is guilty of Loitering when he:

> Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities, . . .

Penal Law § 240.35(4).

ARGUMENT

POINT I

DEFENDANTS ARE CHALLENGING PENAL LAW § 240.35(4) "AS APPLIED," AND NOT "FACIALLY"

Litigants may bring a "facial challenge" to a statute, which addresses the text of the law itself and challenges the constitutionality in general, or an "as applied" challenge, which challenges only the constitutionality of the law as applied to a particular set of facts and leaves the statute on the books. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 770 n.11 (1988); *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 -175 (2d Cir. 2006); *People v. Stuart*, 100 N.Y.2d

412, 421-24 (2003). The Supreme Court has long held that even laws that are held constitutional on their face may be unconstitutional as applied to a particular set of facts:

> Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.

Boddie v. Connecticut, 401 U.S. 371 (1971); *see also Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 -175 (2d Cir. 2006) ("An 'as-applied challenge,' . . . requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right."); *Mintz v. Baldwin*, 2 F.Supp. 700 (N.D.N.Y. 1933) ("It is well settled that a statute may be constitutional as applied to one set of facts and unconstitutional as applied to another") (citations omitted).

As will be demonstrated, applying New York's anti-mask law to prohibit Defendants' mask-wearing in these particular circumstances violates their rights to free expression under the First Amendment to the U.S. Constitution and the New York State Constitution. Thus, this court should uphold Defendants' as applied challenge and dismiss the loitering charge.

POINT II

PENAL LAW § 240.35(4) IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS BECAUSE IT IMPERMISSIBLY BURDENS THEIR FIRST AMENDMENT RIGHTS OF SYMBOLIC SPEECH

It is well established that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black,* 538 U.S. 343 (2003). However, not all conduct constitutes "speech." When a claimant seeks protection for conduct,

rather than pure speech, courts first examine whether the actions constitute "expressive conduct" entitled to protection under the First Amendment, as incorporated by the Fourteenth Amendment; and if they do, whether the regulation impermissibly denies the claimant such protection. *See Texas v. Johnson,* 491 U.S. 397, 403 (1989); *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 319 (2d Cir. 2003).

A. Defendants' Conduct Constitutes Symbolic Speech that Implicates the First Amendment

1. The Legal Standard Defining When Conduct Constitutes Symbolic Speech that Implicates the First Amendment

To determine whether particular conduct is sufficiently expressive to implicate the First Amendment, the test is whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson,* 491 U.S. 397, 404 (1989); *see also Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004).[20]

i. The Second Circuit's application of the "particularized message" test in *Church of the American Knights of the Ku Klux Klan v. Kerik*[21]

In *Church of the American Knights of the Ku Klux Klan v. Kerik*, the American Knights sought to demonstrate in New York wearing the robe, hood and mask that has traditionally been associated with the Ku Klux Klan ("Klan"). *Kerik*, 356 F.3d at 201-02. The American Knights is

[20] The Supreme Court has said that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). In *Kerik,* the Second Circuit noted that *Hurley* did not alter the standards for determining when activity is "expressive conduct" meriting First Amendment protection. 356 F.3d 197, n.6. In other cases, however, the Second Circuit has incorporated this language when analyzing conduct for a "particularized message," *see Latino Officers Ass'n, New York, Inc. v. City of New York*, 196 F.3d 458, 465 -466 (2d Cir. 1999) (referencing *Hurley* in concluding that wearing the New York Police Department uniform qualified as protected expressive conduct.); *Zalewska*, 316 F.3d 319 ("To be sufficiently imbued with communicative elements, an activity need not necessarily embody 'a narrow, succinctly articulable message,' but the reviewing court must find, at the very least, an intent to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it.").

[21] Defendants apply the standard articulated in *Kerik* even though they believe its holding and reasoning were incorrect.

a political organization that is formally separate from the "Ku Klux Klan," but espouses the same racist and separatist ideology as the Klan and wears the same "regalia" as the Klan. *See id.* at 199-200.[22] They argued that their right to wear the mask is protected as symbolic expression under the First Amendment because it conveys the ideological message of the organization, and therefore New York's anti-mask statute unconstitutionally infringed on their right to symbolic expression. *See id* at 205-06.

The Second Circuit rejected this argument and held that the American Knight's mask was not expressive conduct meriting First Amendment protection. The court reasoned that the robe and the hood were sufficient to convey the ideological message that the demonstrators were identified with the Klan, and the mask added nothing whatsoever. More specifically, the court stated that

- "The expressive force of the mask is. . . redundant," or "duplicative" of the robe and the hood (*id.* at 206);
- The mask "adds no expressive force to the message portrayed by the rest of the outfit" (*id.*), and "has no independent or incremental expressive value" (*id.* at 208); and
- The mask does not, in any way, increases the likelihood that members of the public who see the individuals will understand the message ("A witness to a rally where demonstrators were wearing the robes and hoods of the traditional Klan would not somehow be more likely to understand that association if the demonstrators were also wearing masks.") (*id.* at 206-07).

In addition, the Second Circuit emphasized that "mask wearing appears to be, to some extent, optional among American Knights," *id.* at 207, and "[a]t one point in Klan history, masks were not merely non-mandatory but were even prohibited," *id.* at n.9 (emphasis in original). It held that these facts "diminished" the "expressive quality of the mask." *Id.* at 207.

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[22] The lower court decision (which was reversed by *Kerik*), describes the American Knights' ideology and association with the Klan in greater detail than *Kerik*. *See Church of Am. Knights of Ku Klux Klan v. Kerik*, 232 F. Supp. 2d 205, 208 (S.D.N.Y. 2002) *rev'd and remanded sub nom. Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004) (lower court decision describing the American Knights' ideology and association with the Klan in greater detail than the Second Circuit opinion).

The Second Circuit also distinguished *Kerik* from another Second Circuit case where the demonstrators' uniforms made it more likely that observers would understand their message, and thus, wearing the uniform was protected expression. In *Latino Officers Ass'n, v. City of New York* ("LOA"), 196 F.3d 458 (2d Cir. 1999), Latino officers wanted to march in parades wearing their uniforms to protest discrimination and misconduct in the NYPD, and claimed the NYPD's parade policy preventing this conduct violated their First Amendment rights. The court held that the issue in *LOA* was not whether the parade spectators would be likely to understand the Latino officers' message from the uniforms alone—but, instead, whether the spectators would be more likely to understand the message if the officers were wearing the uniforms than if they were not wearing them. *See Kerik*, 356 F.3d at 207 (citing *LOA,* 196 F.3d at 465-66). Whereas the uniforms in *LOA* would increase the observer's likelihood of understanding the demonstrators' message, the masks in *Kerik* did not increase the public's likelihood of understanding the demonstrators' message; thus the uniforms in *LOA* were protected expression, but the masks in *Kerik* were not. *See id.*[23]

Finally, the *Kerik* court noted that its decision was consistent with other jurisdictions' decisions, which similarly held that the masks worn by Klan members added no expressive value to the message, and, thus were not protected. *See id.* (citing *Hernandez v. Superintendent,* 800 F.Supp. 1344, 1351 (E.D.Va.1992) ("[T]he mask contributes nothing to the message already conveyed by the remainder of the costume, nor does it convey any independent message. Thus, on the facts presented, petitioner's mask-wearing did not constitute expressive conduct entitled to First Amendment protection because it did not convey a particularized message.") and *Hernandez v. Commonwealth,* 12 Va.App. 669, 673, 406 S.E.2d 398, 400 (1991) ("Without the

[23] In distinguishing *Kerik* from *LOA*, the Second Circuit again emphasized the complete lack of any expressive value of the masks, stating, "[i]f the LOA's wearing of uniforms had added nothing whatsoever to their message, we would not have found the same First Amendment concerns implicated." (emphasis added). *Id.*

mask, the social and political message conveyed by the uniform of the Ku Klux Klan is the same as it would be with the mask.")).[24]

2. The Mask Worn by Defendants Constitutes Symbolic Speech that Is Protected by the First Amendment

i. The balaclava is the defining symbol of Pussy Riot

Unlike the American Knights' mask in *Kerik*, which the Second Circuit found to be "redundant" of the robe and hood and to "add[] no expressive force" to the message, the balaclavas are the defining symbol of Pussy Riot. Even though the women in Pussy Riot also wear brightly colored tights and dresses,in demonstrations of support for Pussy Riot and their cause, the brightly colored balaclava is much more prominent, and has repeatedly been referred to in the press as the group's "trademark"[25] and "mask symbol."[26]

Many people have expressed their support for Pussy Riot and the three arrested women by wearing a balaclava, but not brightly colored tights and dresses. For example, when Amnesty International suggested that one "Don a Balaclava" in support of Pussy Riot as a Halloween costume, it mentioned only the balaclava, and said nothing about the tights and dress:

> [T]he women of Pussy Riot wear balaclava masks not only to protect their identities, but also to let the world know that anyone can fight for the right to free expression. This Halloween you can stand united with thousands of activists all over the country and wear a balaclava in support of Pussy Riot.

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[24] However, in opposition to *Kerik*, it should be noted that other jurisdictions have held that the Klan's wearing of the mask is symbolic expression that is expression that is protected under the First Amendment. *See., e.g., Church of Am. Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 587-88 (W.D. Pa. 2000) ("This Court is satisfied that the white hoods [which cover the Klan members' faces] would likely be understood by onlookers as symbolic of the Klan's identity and unity of purpose in advocating issues such as white supremacy, separation of the races, intolerance toward non-Christians, ethnic minorities and homosexuals, and the like. . . Thus, we conclude that the wearing of hoods by Plaintiffs' members constitutes symbolic speech which is entitled to First Amendment protection.").

[25] *See, e.g.,* Ellen Barry & David M. Herszenhorn, *Undaunted by Arrests, the Opposition Marches Against Putin*, N.Y. TIMES, Sept. 16, 2012, at A17, *available at* http://www.nytimes.com/2012/09/16/world/europe/anti-putin-protesters-march-in-moscow-russia.html. David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, August 17, 2012, at A1, *available at* http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html.

[26] Melena Ryzik, *An Award and More Support for Pussy Riot,* N.Y. TIMES, Sept. 21, 2012, http://artsbeat.blogs.nytimes.com/2012/09/21/an-award-and-more-support-for-pussy-riot/.

> All you need is a brightly-colored beanie, a pair of scissors, and a marker. Cut three holes in the beanie for your eyes and mouth. Head out into the night and exchange candy for Pussy Riot pins, stickers, and our palm-sized guide. . . Ensure that the women of Pussy Riot are never forgotten. Don a balaclava and support freedom of speech![27]

Moreover, in explaining that "Pussy Riot had been a galvanizing force for young activists," the director of Amnesty International USA did not mention the tights or dressand said only, "'[o]ur student members are passing out colorful balaclavas . . . on campus . . . and organizing. It's spoken to the next generation in a powerful way.'"[28] Similarly, as demonstrated in Exhibit A to Norman Siegel's Affirmation ("Exhibit A"), many websites have pictures of support for Pussy Riot where support is demonstrated by the mask alone.[29]

At demonstrations throughout the world, many demonstrators have worn only the balaclava as a symbol of their support.[30] For example, in Russia, approximately 20 protesters who were demonstrating outside the Russian Church where Pussy Riot was arrested wore the group's trademark colored balaclavas—but not brightly colored clothing—and held up individual letters that spelled a New Testament phrase, "Blessed are the merciful" to show their support.[31] Also in Russia, at a later anti-Putin demonstration that, according to the New York Times, "drew tens of thousands,"

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[27] Amnesty International, *Last-Minute Halloween Costume Idea: Don a Balaclava for Pussy Riot*, Oct. 29, 2012, http://blog.amnestyusa.org/music-and-the-arts/last-minute-halloween-costume-idea-don-a-balaclava-for-pussy-riot/ (emphasis added).

[28] Melena Ryzik, *An Award and More Support for Pussy Riot,* N.Y. TIMES, Sept. 21, 2012, http://artsbeat.blogs.nytimes.com/2012/09/21/an-award-and-more-support-for-pussy-riot/.

[29] *See* Exhibit A*; see also, e.g.,* Dashiell Bennett, *Russian Punk Band Pussy Riot Found Guilty*, THE ATLANTIC WIRE, August 17, 2012, http://www.theatlanticwire.com/global/2012/08/russian-punk-band-pussy-riot-found-guilty/55881/.

[30] *See, e.g.*, David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, August 17, 2012, at A1, *available at* http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html.

[31] *See* The Telegraph, *Pussy Riot protesters arrested*, Aug. 15 2012, *available at* http://www.telegraph.co.uk/news/worldnews/europe/russia/9477372/Pussy-Riot-protesters-arrested.html.

> [t]he trademark neon balaclavas of Pussy Riot . . . appeared on buttons and balloons and, in a basket carried by one marcher, on three disembodied mannequin heads. One demonstrator opened his vest for a photographer to show that he had shaved the image of a balaclava into his chest hair.[32]

Moreover, many of Pussy Riot's celebrity supporters have demonstrated their support for Pussy Riot and their message by wearing a balaclava—but no other costume associated with Pussy Riot—at public appearances. Perhaps most notably, when Madonna performed a concert in Moscow, to show her support for Pussy Riot, she wore a balaclava and black bra—no brightly colored tights or dress—and had "Pussy Riot" written on her back.[33] Other celebrities have appeared on the red carpet sporting a balaclava with the usual black tie red-carpet attire.[34]

In addition, paraphernalia associated with Pussy Riot emphasizes the balaclava, and often does not refer to the brightly colored tights and dress. For example, Amnesty International's "Free Pussy Riot" t-shirt, which is sold on its website, shows a woman outlined in white on a black t-shirt with a pink balaclava and the words "Free Pussy Riot" on the shirt.[35] Again, there is nothing related to the brightly colored tights or dress.

ii. The mask is integral to Pussy Riot's ideology that advocates gender equality and political activism, and protests against the Russian government

The balaclava is not only the iconic symbol of Pussy Riot, it is also a fundamental part of the band's substantive message advocating feminist and anti-homophobic principles and political

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[32] *See* Ellen Barry & David M. Herszenhorn, *Undaunted by Arrests, the Opposition Marches Against Putin*, N.Y. TIMES, Sept. 16, 2012, at A17, *available at* http://www.nytimes.com/2012/09/16/world/europe/anti-putin-protesters-march-in-moscow-russia.html.

[33] *See* David M. Herszenhorn, *In Russia, Madonna Defends a Band's Anti-Putin Stunt*, N.Y. TIMES, Aug. 8, 2012, at A3 *available at* http://www.nytimes.com/2012/08/08/world/europe/madonna-defends-pussy-riot-at-moscow-concert.html; *see also* Exhibit A

[34] *See* Natalia Antonova, *Trendwatcher: Glory & Balaclavias at Moscow International Film Festival*, http://www.en.rian.ru/columnists/20120629/174316497.html (last visted November 19, 2012).

[35] *See* Shop Amnesty International, http://shop.amnestyusa.org/Amnesty-International-USA-FreePussyRiot-TShirt/dp/B008RYM7W0.

activism, and protesting against the Russian government's repression of free expression and other political liberties.

From its inception, Pussy Riot has considered itself a feminist protest band that supported feminist and anti-homophobic principles. Members of the band have said they were "galvanized originally by their opposition to government policies against women," and that they did not start as performers, but believed that punk performances would be a good way to further their message.[36] Moreover, the three women who were arrested said the performance that led to their arrest was aimed to criticize conservative approaches towards gender equality and rights for gay people.[37] Also from the band's inception, the women in Pussy Riot have viewed the balaclava as integral to this message of feminist and anti-homophobic principles. As one of the three arrested band members explained in an interview:

> The idea of equality between people, equality between the sexes. It's because we have created this character of a young woman in a balaclava, this strange person who isn't very feminine, who is above all androgynous. On one hand, the image of a young woman in a dress, and on the other, the balaclava. That's what's striking.[38]

In addition to advocating in favor of equality and rights for women and the LGBT community, Pussy Riot is also protesting against the Russian government, which represses free expression and other political liberties,[39] and calling for others to become more politically engaged.[40]

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[36] See Corey Flintoff, *In Russia, Punk-Rock Riot Girls Rage Against Putin*, NPR, Feb 8, 2011, http://www.npr.org/2012/02/08/146581790/in-russia-punk-rock-riot-girls-rage-against-putin. The group's feminist origin is further demonstrated by the title of its debut album entitled "Kill the Sexist" (*Ubey seksista*). *See* Amanda Horner, *Russia attacks free speech, punk music*, Northern Arizona News, September 2, 2012, http://northernarizonanews.com/blog/2012/09/02/pussy-riot-prison-sentence-an-attack-on-freedom-of-speech/ .

[37] Human Rights Watch, *Russia: Justice Fails at Pussy Riot Appeal,* October 10, 2012, http://www.hrw.org/news/2012/10/10/russia-justice-fails-pussy-riot-appeal.

[38] *See A Rioter's Prayer: Echo of Moscow interviews Yekaterina Samutsevich* (trans. Iddhis Bing), GUERNICA, Nov. 1, 2012, *available at* http://www.guernicamag.com/interviews/a-rioters-prayer/.

[39] *See* Miriam Elder, *Pussy Riot Trial: 'We are representatives of our generation,'* THE GUARDIAN, August 17, 2012, http://www.guardian.co.uk/world/2012/aug/17/pussy-riot-trial-representatives-generation; Reuters, *Russia's Pussy*

Pussy Riot's view is that these messages are more important than the individuals who are espousing them. In support of this theory, one of the members said in an interview, "Our goal is to move away from personalities and towards symbols and pure protest."[41] Similarly, another member said, "The idea of the group is that taking part in Pussy Riot is absolutely anonymous and anyone can take part."[42]

And, given that Russia has a repressive government, the anonymity provided by the balaclava allows Pussy Riot to continue their political protests regardless of the fate of individual members. As one of the members explained, Pussy Riot is "always" looking for new members and "has to keep on expanding."[43] She continued:

> That's one of the reasons we choose to always wear balaclavas—new members can join the bunch and it does not really matter who takes part in the next act—there can be three of us or eight, like in our last gig on the Red Square, or even 15. Pussy Riot is a pulsating and growing body.[44]

She further explained that the balaclava and the anonymity it provides allow Pussy Riot to continue to grow, despite "police/state" harassment:

> We have nothing to worry about, because if the repressive Putinist police crooks throw one of us in prison, five, ten, 15 more girls will put on colorful balaclavas and continue the fight against their symbols of power.[45]

Riot: Unmasked, August 08, 2012, *available at* http://www.reuters.com/article/2012/08/08/us-russia-pussyriot-profile-idUSBRE87709420120808; *See also* Lara Reznik, *"We Are All Pussy Riot" But Who Are "We"?* UNIVERSITY OF CHICAGO DIVINITY SCHOOL, September 20, 2012, *available at* http://divinity.uchicago.edu/.

[40] For example, in her closing statement at trial the arrested band members lamented the lack of protest. One of the women said, [W]e are deeply frustrated by the scandalous dearth of political culture, which comes as the result of fear and that is kept down through the conscious efforts of the government and its servants." Pussy Riot Closing Statements (trans. Marijeta Bozovic, Maksim Hanukai, and Sasha Senderovich), n + 1, Aug. 13, 2012, available at http://nplusonemag.com/pussy-riot-closing-statements.). Similarly, another said, "I find it even more astonishing that people don't believe that they can have any influence on the regime. . . . They no longer have a sense of themselves as citizens." *Id.*

[41] *See* Henry Langston, *Meeting Pussy Riot*, VICE, March 2012, http://www.vice.com/read/A-Russian-Pussy-Riot.

[42] *See* Reuters, *Russia's Pussy Riot: Unmasked and on trial*, THE CHICAGO TRIBUNE, Aug. 08, 2012, *available at* http://articles.chicagotribune.com/2012-08-08/news/sns-rt-russia-pussyriotprofile-tv-pixl4e8j84vp-20120808_1_russian-punk-band-maria-tsvetkova-nadezhda-tolokonnikova.

[43] Henry Langston, *Meeting Pussy Riot*, VICE, March 2012, http://www.vice.com/read/A-Russian-Pussy-Riot.

[44] *Id* (emphasis added).

[45] *Id* (emphasis added).

iii. The balaclava worn by Defendants is distinguishable from the mask in *Kerik* and conveys a "particularized message" that is has a great likelihood of being understood by viewers

All of the factors that led the Second Circuit to conclude that the mask in *Kerik* was not symbolic speech are distinguishable here.

First, the mask worn by Defendants is not "redundant" or "duplicative" of the message the clothing conveys; it "adds . . . expressive force" and certainly has "independent or incremental" expressive value. Any defining symbol or "trademark" of the message certainly can't be called "duplicative" or "redundant." Moreover, it "adds . . .expressive force" and certainly has "independent or incremental" expressive value because, as demonstrated above, the mask is integral to Pussy Riot's substantive message advocating feminist and anti-homophobic principles,political activism and protest against the Russian government. Thus, rather than being "duplicative," the balaclava plays the same role for Pussy Riot as the hood and robe play for the American Knights. As the *Kerik* court said of the American Knights' regalia:

> they are expressive in the way that wearing a uniform is expressive, identifying the wearer with other wearers of the same uniform, and with the ideology or purpose of the group. We do not doubt that a person who viewed a member of the American Knights wearing such regalia would likely grasp that association.

Kerik, 356 F.3d at 206.

Second, the mask increases the likelihood that members of the public who see Defendants will understand their message of support for Pussy Riot. Since, as demonstrated above, the balaclava is the defining symbol of Pussy Riot and support for the three arrested members, those witnessing the protest are more likely to understand that Defendants' support Pussy Riot if they are wearing the mask than if they are not. Given the media coverage and attention paid to the mask, those with only a peripheral knowledge of the issue may recognize the mask, but be unaware that the Pussy Riot members also wore brightly colored tights and dresses; thus the

balaclava will identify Defendants as supporters of Pussy Riot to these less engaged people. Thus, Defendants' situation is more analogous to the officers' in *LOA* 196 F.3d 458, than to the American Knights' in *Kerik*, where the association of the hood and garb is so powerful in the nation's collective consciousness that the mask would not, in any way, increase the likelihood that spectators would understand the message.

Third, unlike in *Kerik* where wearing the mask was "to some extent optional," and at one point in history prohibited, members of Pussy Riot wear the balaclava every time they perform. *See Kerik,* 356 F.3d at 207 & n. 9. Thus, this fact—which "diminished the expressive quality" of the American Knights' mask—is inapplicable here.

The same facts that distinguish the balaclavas from the masks in *Kerik* should lead the Court to conclude that Defendants' wearing of the masks conveys a "particularized message" that has a high likelihood of being understood by the public, and thus, constitutes symbolic speech under *Johnson*.

iv. Given the context of Defendants' mask-wearing, the public was highly likely to understand their message

Numerous Supreme Court and Second Circuit opinions establish that the context in which the conduct occurs is important for determining whether it conveys a particularized message that is likely to be understood by those who view it, and thus, whether the conduct is entitled to First Amendment protection. For example, in the seminal *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court noted that "the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern-the Vietnam hostilities." *Spence v. State of Wash.*, 418 U.S. 405, 410 (1974) (referencing *Tinker*, 393 U.S. at 505-14); *see also Johnson*, 491 U.S. 405 ("[I]n characterizing such action for First Amendment purposes, we have considered the context in

which it occurred.");[46] *LOA*, 196 F.3d 466 ("[I]n conducting the necessary inquiry into 'whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,' a court should not disregard 'the context in which [that conduct] occurred.'"(citations omitted)); *Zalewska*, 315 F.3d 320 ("Essential to deciding whether an activity carries a perceptible message entitled to protection is an examination of the context in which the activity was conducted.").

Moreover, numerous Supreme Court opinions have found the political context in which conduct occurred significant to viewers' understanding of the message. For example, in *Johnson* the Court found it significant that the flag-burning was part "of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President," *Johnson*, 491 U.S. at 406. Similarly, in *Spence*, the protest was a response to the expansion of the Vietnam War into Cambodia and the killings that occurred during the related Kent State student protest. *See Spence*, 418 U.S. at 410; *see also Tinker,* 393 U.S. at 505-514 (finding that black arm bands conveyed a clear message regarding the contemporaneous Vietnam War).

August 17, 2012, the day that Defendants were demonstrating in support of Pussy Riot, was the day the arrested Pussy riot members were convicted and sentenced to two years in prison. In anticipation of the conviction and sentencing, protesters held demonstrations of

[46] In analyzing the context of Johnson's conduct the Court found:

> Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication (internal citations omitted). *Johnson*, 491 U.S. at 406.

solidarity around the world in which participants, like Defendants, wore balaclavas. In addition, the Defendants demonstrated first in front of, and subsequently across the street from, the Russian Consulate on 91st Street, between Madison and Fifth Avenues. Other acts of support for Pussy Riot have taken place in similar locations. On the same day, demonstrators gathered outside the Russian Embassy in Berlin, and in July 2012, demonstrators gathered outside the Russian Embassy in Washington, D.C.[47]

Thus, wearing the balaclava on August 17, 2012 at a demonstration outside the Russian Consulate was unmistakably a particularized message of support for Pussy Riot and a condemnation of the anticipated unfair sentencing, and there was a great likelihood viewers would understand this message.

B. Penal Law § 240.35(4) Impermissibly Burdens Defendants' First Amendment Right of Symbolic Speech

Once a court determines that conduct is protected by the First Amendment, it must then determine whether the regulation in question impermissibly burdens the claimant's rights. *See Johnson,* 491 U.S. at 403; *Zalewska*, 316 F.3d at 319 (2d Cir. 2003). If, in an "as applied" challenge, the state's asserted interest in the regulation is not "implicated on the facts before [the court]," the state has no justification for the infringement on rights, and the application of the regulation is thus, unconstitutional "as applied" to the claimant. *See infra*, Point II.B.1. If, on the other hand, the government's interest is implicated by the facts on the record, the court may apply the four-prong test from *United States v. O'Brien*, 391 U.S. 367 (1968), for determining whether a law of general applicability (i.e., a law that is not related to expression) that is directed at conduct unconstitutionally suppresses acts of symbolic expression. *See Johnson,* 491 U.S. at

[47] *See id.*; Eliza LaJoie, *Pussy Riot Protesters Gather Outside Russian Embassy in D.C.*, The Huffington Post (July 28, 2012) (available at http://www.huffingtonpost.com/2012/07/28/pussy-riot-protest-dc_n_1713903.html)

403.

1. The O'Brien Test Does Not Apply in this Case Because the Government's Interest in Enforcing Penal Law §240.35(4) Is Not Implicated by Defendants' Conduct and the Regulation as Applied Impermissibly Burdens Defendants' Rights

In *Johnson*, the Supreme Court held that if the asserted government interest is not implicated by the facts before the court, a court should not apply the *O'Brien* test; instead, the state's interest "drops out," and the court should hold that the regulation impermissibly burdens expression. This situation is applicable to Defendants; thus, the Court should hold that New York's anti-mask law impermissibly violates Defendants' First Amendment rights.

i. *Texas v Johnson*

In *Texas v. Johnson*, the Court considered an "as applied" challenge to a law that prohibited flag desecration. *Johnson*, 491 U.S. at 403 n.3 ("Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment"). Significantly, the Court stated, "If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies," *Johnson*, 491 U.S at 407; *see also Bellecourt v. Cleveland*, 820 N.E.2d 309, 312-13 (2004) ("The threshold issue to *O'Brien*'s test is whether a governmental interest asserted by [the city] is implicated on the facts before us. If the city has not asserted a pertinent interest, then we cannot apply *O'Brien*'s test").

Applying this analysis, the Court examined whether Texas's asserted interest in "preventing breaches of the peace" was "implicated" by Johnson's conduct in burning the American Flag at the Republican Convention in 1984. *Id.* at 407-08. It held that this interest was "not implicated on [the] record [before the Court]." *Id* at 407. It reasoned:

> Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag.

> Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flag-burning or in response to the flag-burning." The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.
>
> The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption.

Id., at 407-408.

The *Johnson* Court further stated that if the government's asserted interest is not implicated by the facts before the court, then the regulation should be held unconstitutional because the government has failed to justify its infringement on free expression. *See Id.* at 403-04 ("A . . . possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture); *see also Bellecourt*, 820 N.E.2d at 312-13 ("If the city has not asserted a pertinent interest, then we cannot apply *O'Brien*'s test, and the city will have failed to justify its infringement upon appellees' right to free speech"). In *Johnson*, however, the determination that Texas's asserted interest in preventing breaches of the peace was not applicable to Johnson did not end the analysis because the state asserted as second interest—in "preserving the flag as a symbol of nationhood and national unity—and the court went on to examine whether this interest justified the infringement on Johnson's rights (holding that it, in fact, did not justify the infringement).

ii. Application to Defendants

The only interest the City can assert for the anti-mask law is to deter violence and prevent people from using masks to commit crimes and escape apprehension. Penal Law § 240.35(4) has

its origins in "An Act to prevent persons appearing disguised and armed," a law passed in 1845. *See People v. Aboaf*, 187 Misc. 2d 173, 183-84, 721 N.Y.S.2d 725, 733 (Crim. Ct. 2001) (Carro, J.) (tracing the evolution of the anti-mask law through the various repeals and re-enactments stating "the conclusion is inescapable that section 240.35[4] has its origins in the 1845 Act"). The purpose of the 1845 Act was to quell the "anti-rent riots," an armed insurrection by farmers in the Hudson Valley:

> This particular statute was addressed to a specific group of insurrectionists who, while disguised as 'Indians,' murdered law enforcement officers attempting to serve writs upon the farmers. The 'Indians' were in fact farmers, who as part of their costumes, wore women's calico dresses to further conceal their identities[.]

Abouf, 187 Misc. 2d at 183 (citation omitted).[48] The Act thus sought "to prohibit wearing masks in order to prevent identification during lawless activity," *id.* at 184, and its goal was to "deter[] violence and facilitate[] the apprehension of wrongdoers," *Kerik*, 356 F.3d at 205. In the prior challenge to this law, the government argued its interest was "security and law enforcement concerns," indicating that the current law has the same purpose as its predecessor. *See Church of Am. Knights of Ku Klux Klan v. Kerik*, 232 F. Supp. 2d 205, 219 (S.D.N.Y. 2002) *rev'd and remanded sub nom.*, 356 F.3d 197 (2d Cir. 2004).

Similar to *Johnson*, the asserted interest—here, in crime prevention and apprehending criminals—is "not implicated on this record." Defendants were participating in a peaceful demonstration that posed no threat to peace or enforcing the law. Nothing in their conduct can

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[48] Moreover, when urging the passage of this law for the "prevention and punishment of crime," New York's governor in 1845 explained:

> [T]he disguises of ... organized bands, calling themselves Indians, are assumed [*i.e.*, worn] for purposes unlawful and highly criminal .... After [an] offense, or other and higher crime has been perpetrated, the disguise is laid aside, and even eye witnesses upon the spot, may not be able to identify the guilty.

Kerik, 356 F.3d at 204-05 (citations omitted). The governor further stated that the an anti-mask law "'would go far to aid in the prevention of the crimes which have been recently so daringly committed, under the protection of masks and other disguises.'" *Id.* at 205.

be construed as "lawless activity," such that wearing masks would help prevent their apprehension by law enforcement. Further, the record offers no evidence that Defendants' conduct in anyway implicated the relevant government interest in crime prevention and apprehending criminals.

Since the government's interest in crime prevention and apprehending criminals is not implicated in Defendants' situation, the *O'Brien* test does not apply. Thus, there is no justification for the restriction on Defendants' First Amendment protected activity, and the statute is unconstitutional "as applied" to them.

2. Even if the O'Brien Test is Applied to the Facts at Issue, Penal Law § 240.35(4) Fails to Pass that Test

Even if the Court determines that a government interest is implicated by the facts of this case, the Court should still find that the regulation as applied to Defendants' wearing balaclavas was unconstitutional because it does not pass the *O'Brien* test. In *O'Brien*, the Supreme Court laid out a four-part test for determining whether a law of general applicability that is directed at conduct and not at expression unconstitutionally suppresses acts of symbolic expression. The Court stated:

> Government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

In analyzing, under the *O'Brien* test, whether the government's asserted interest is "important or substantial" and whether the restriction "is no greater than is essential," courts should apply intermediate scrutiny. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (describing the *O'Brien* test as one of intermediate scrutiny); *see also Turner Broad. Sys.,*

Inc. v. F.C.C., 512 U.S. 622, 661-62 (1994) (referencing *O'Brien* for the proposition that intermediate scrutiny is applied to content-neutral restrictions that incidentally burden speech).

Under intermediate scrutiny, "the Government . . . bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 664-65 (internal quotations and citations omitted). According to the Supreme Court's jurisprudence, the "application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring). The government must show "some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed." *Id.* at 313.

As applied to Defendants, Penal Law § 240.35(4) fails the fourth prong of *O'Brien* requiring that "the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

A more narrowly tailored interpretation of Penal Law § 240.35(4), which would permit Defendants' conduct, is certainly possible, as has been demonstrated by the state court decision in *People v. Aboaf*, 187 Misc. 2d 173 (N.Y.C. Crim. Ct. N.Y. County 2001)(Carro, J.). The *Aboaf* court construed the statute as prohibiting only masks worn for "no legitimate purpose," and articulated two reasons supporting this construction. First, it stated that prohibiting masks only when worn for "no legitimate purpose" is consistent with the historical purpose of the statute to facilitate apprehending those engaging in "lawless activity." Along these lines, it noted that such a construction "may reasonably be found implicit in the words used by the Legislature." *Id* at 184. Second, the court explicitly recognized that masks can have expressive

content, "such as a gas mask used to protest environmental degradation," *id.* at 181, and reasoned that its more narrowly tailored construction of the statute would permit masks worn "for [such] communicative purposes" that are protected by the First Amendment. *id.* at 184.

It should further be emphasized that in deciding to uphold the law as constitutional on its face, the *Aboaf* court explicitly recognized that the statute could be unconstitutional in certain situations, and argued that future defendants should bring an "as applied" challenge—i.e. they should proceed exactly as Defendants are in the instant proceeding. *See id.* at 183 ("[I]t is possible the law could be impermissibly applied to the wearing of masks for symbolic expression."), and at 184 ("[I]mpermissible applications of the statute" [may still exist even if it narrowly construed and]. . .can be remedied on an 'as applied' or case-by-case basis.").[49] In the instant case, Penal Law § 240.35(4) is not sufficiently narrowly tailored as applied to Defendants' conduct because it sweeps within its ambit Defendants' protected expressive conduct, in violation of the First and Fourteenth Amendments.

Finally, the City's inconsistent record of enforcing Penal Law § 240.35(4) in similar situations casts serious doubt on whether, as applied to Defendants conduct and the facts of this case, the government's interest is in fact "important or substantial" and whether the regulation

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[49] Though in *People v. Bull*, 5 Misc. 3d 39 (App. Term 2004), the Appellate Term claimed that the Judge Carro's analysis in *Aboaf* was flawed, in fact, it is the appellate term's reasoning that is incorrect, not Judge Carro's. In *Bull*, the Appellate Term argued that the Judge Carro's narrow reading that only prohibited masks worn for "no legitimate purpose" "is at odds with the Second Circuit's subsequent decision in *Kerik* upholding the constitutionality of the statute as written," *id.* at 41. However, this is, quite simply, not true. The *Kerik* court held the conduct in question was not protected by the First Amendment—thus is never reached the question of whether the statute impermissibly infringed on the claimant's rights, which is the second step in the analysis. *See supra*, Point II at 8, and Point II.A.i at 9-12. In other words, the Second Circuit never addressed the issue of whether the statute should be read to include only conduct that "has no legitimate purpose," so Judge Carro's interpretation wasn't at odds with that decision.

Moreover, neither Judge Carro's decision in *Aboaf*, nor the Appellate term's in *Bull* is controlling here (though Judge Carro's decision in *Aboaf* is illustrative of how Defendants believe the statute should be interpreted). In that case the courts ruled on a facial challenge rather than an "as applied" challenge, and Defendants' here are only challenging the statute "as applied."

burdens Defendants' First Amendment rights only so much as is "essential to the furtherance of that interest" with respect to the Defendants' conduct. In *LOA,* the Second Circuit pointed to the government's inconsistent conduct in finding that the asserted government interest "[did] not support the specific restriction at issue," *LOA*, 196 F.3d at 467. Although the court was not applying the *O'Brien* test in *LOA*, the structure of its reasoning in evaluating the asserted government interest is nonetheless pertinent when considering the government's interest in the instant case.[50] According the Second Circuit in *LOA*,

> It is undisputedly true that the NYPD has a strong interest in maintaining control over how its uniform and symbols are used. . . .
>
> Nevertheless, defendants' interest in controlling the use of the NYPD uniform does not support the specific restriction at issue here—namely, the prohibition on plaintiffs' marching in uniform behind their organizational banner in an ethnic pride parade when similarly situated organizations are allowed to march in such a manner. Whether or not defendants could constitutionally prohibit all fraternal organizations from marching in uniform—an issue we need not, and do not, decide—the fact of the matter is that the NYPD already permits at least 25 such organizations to march in uniform. Having allowed these organizations to use the NYPD uniform in such a manner over many decades, the NYPD cannot now deny plaintiffs the same privilege without demonstrating that their use of the uniform is both distinguishable from that of the various authorized organizations and "so threatening to the efficiency of the [NYPD] as to render the [restriction] a reasonable response to the threat."

Id. (quoting *United States v. Nat'l Treasury Employees Union* ("NTEU"), 513 U.S. 454, 473 (1995)).

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[50] In *LOA*, the Second Circuit addressed a restriction on government employee speech. Normally, the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," (196 F.3d at 463). However, when the government regulation constitutes a prior restraint—as it did in *LOA*—courts will require higher burden of justification: that the restriction on First Amendment interests is "outweighed by that expression's 'necessary impact on the actual operation' of the Government," *NTEU*, 513 U.S. at 468.

Like the O'Brien test, the standard applied in *LOA* is one of intermediate scrutiny—requiring less than strict scrutiny but less than rational basis review. Even if one were to argue that the standard of justification in *LOA* is more stringent than the O'Brien test requires, the applicability of court's analysis does not turn on the precise level of justification required because it is the court's analysis goes to the weight that should be given to the government's asserted interest, rather than to the actual outcome of the balancing test.

The case before the court presents a similar situation to *LOA*. While Defendants were arrested and charged for wearing masks in violation of Penal Law § 240.35(4), mask-wearing participants in other demonstrations were not arrested. For example, City officials did not invoke this provision when:

- in 1977, when Iranian students protesting against the Shah wore face masks to hide their identities and protect themselves and their family members from retaliation by the Iranian Secret Police;
- on February 12, 1999, when supporters of black activists Khalid Abdul Muhammad appeared masked at a protest rally held after the funeral of Amadou Diallo;
- on October 23, 1999, when various demonstrators opposing the rally held by the American Knights and also opposing the administration of Mayor Rudolph Giuliani wore rubber face mask satirizing Mayor Giuliani;
- on October 13, 2000 when pro-Palestinian protestors assembled at Times Square; and
- on October 20, 2000, when pro-Palestinian protestors assembled at the Israeli Consulate and the United Nations.

See Church of Am. Knights of Ku Klux Klan v. Kerik, 232 F. Supp. 2d 205, 219 (S.D.N.Y. 2002) *rev'd and remanded sub nom.*, 356 F.3d 197 (2d Cir. 2004). This inconsistent enforcement pattern seriously undermines the government's interest in enforcing Penal Law § 240.35(4) against Defendants' conduct. It stands to reason, in light of *LOA*, that having allowed demonstrators to wear masks in situations similar to that of Defendants,[51] the City should not now be able to apply Penal Law § 240.35(4) to Defendants without demonstrating why their wearing masks is distinguishable, and why it implicates the government interests to a greater degree than did wearing masks in those other situations, which it cannot do because Defendants' conduct was not lawless and their wearing masks in no way impeded apprehension for lawless activity.

[51] Unlike in *Kerik*, where the court distinguished these demonstrations because "the participants did not provide advance warning of their intent to wear masks," *Kerik*, 356 F.3d at 210, no such distinction applies in the case at bar.

For the reasons discussed above, the City's application of Penal Law §240.35(4) to Defendants in this case, fails the "narrowly tailored" requirement of *O'Brien*, and, thus, fails this test.

POINT III
PROHIBITING DEFENDANTS FROM WEARING THE MASKS IN THIS INSTANCE VIOLATES ARTICLE I, § 8 OF THE NEW YORK STATE CONSTITUTION

Even if, contrary to Defendants' arguments, the Court deems the People's actions permitted under the U.S. Constitution, it should hold that the People's action in applying New York's anti-mask law to Defendants violates the free speech provision of the New York State Constitution.

A. Defendants' Conduct Constitutes Expressive Conduct that is Protected Under Article I, § 8 of the New York State Constitution

The Federal Constitution provides a floor, not a ceiling for the protection of rights. *See, e.g., People v. Kohl,* 72 N.Y.2d 191, 210, 532 N.Y.S.2d 45, 527 N.E.2d 1182 (N.Y.1988) ("The guarantees of the Federal Constitution, as construed by the Supreme Court, represent only the minimum level of individual rights which no state may disregard. The protections provided by the New York State Constitution may well be broader."); *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 518 (S.D.N.Y. 2010) *aff'd,* 694 F.3d 208 (2d Cir. 2012) ("It is well established that a state constitutional claim may be broader, but not narrower, than a federal constitutional claim.").

With regard to the right to free speech, the New York State Constitution provides greater protection than the Federal Constitution. As opposed to the Federal Constitution, which only prohibits governments from passing laws that "abridge[] the freedom of speech," the New York State Constitution Article I, Section 8 provides, in the affirmative, that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of

that right; and no law shall be passed to restrain or abridge the liberty of speech. . . ." U.S. Const. amend. I; N.Y. Const. Art. I, § 8. As Judge Kaye explained, "the language of article I, § 8 of our State Constitution is materially different—more expansive—than the First Amendment; article I, § 8 has a longer, independent history," *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 531, 523 N.E.2d 277, 282 (1988) (Kaye, J., concurring); *see also id.* at 529, 281 (majority) ("The protection afforded by the guarantees of free . . . speech in the New York Constitution is often broader than the minimum required by the First Amendment"). This broader protection for free speech is exemplified by the Court of Appeal's decision in *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 503 N.E.2d 492 (1986). In that case, the United States Supreme Court found that the sexual activity in question was not expression that was protected by the First Amendment and, thus, the state's closing a bookstore for one year as a public nuisance did not violate the U.S. Constitution. However, on remand, the Court of Appeals held that, even though the state's action did not violate the U.S. Constitution, it nonetheless violated the New York State Constitution's free speech provision. *See id* at 559, 495.

The test for whether conduct is protected by the First Amendment to the U.S. Constitution—whether there was an intent to convey a particularized message and a great likelihood that the message would be understood—is also employed for determining whether expressive conduct is protected by Article I, § 8 of the New York State Constitution. *See People v. Hollman*, 68 N.Y.2d 202, 205, 500 N.E.2d 297, 299 (1986) (applying this test to hold that nude sunbathing on a beach did not convey a particularized message that was likely to be understood by viewers, and, thus, was not conduct protected by the New York State Constitution); *People v. Schrader*, 162 Misc. 2d 789, 796, 617 N.Y.S.2d 429, 436 (Crim. Ct. 1994) (applying this test to hold that begging conveyed a particularized message that was likely

to be understood by viewers and, thus, constituted expressive conduct that was protected by the New York State Constitution). Moreover, since the New York State Constitution provides greater protection to freedom of expression, a state court held that conduct that maynot be protected under the First Amendment (begging) indeed met the test under the State Constitution and was, thus, protected. *See Schrader*, 162 Misc. 2d at 789, 436 (holding that begging met this standard under the New York State Constitution, even though the Second Circuit had held that it did not meet the standard under the First Amendment). As Defendants have argued in Point II.A, *supra*, their conduct conveys a particularized message that is likely to be understood by viewers, and, thus, meets this standard.

In sum, since the New York State Constitution provides greater protection for free speech than the U.S. Constitution, and Defendants' wearing masks in these circumstances meets the test for protected conduct, the Court should find that Defendants' conduct is protected under Article I, § 8 of the New York State Constitution.[52]

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[52] Though in *Festa v. New York City Dept. of Consumer Affairs* the Supreme Court held that "social dancing," i.e., dancing that takes place in bars or restaurants for dancers' own pleasure rather than for the pleasure of observers, is not protected conduct under New York State's constitution, that holding is not relevant to the issue of whether Defendant's conduct is protected. *See* 12 Misc. 3d 466, 820 N.Y.S.2d 452 (Sup. Ct. 2006) *aff'd as modified*, 37 A.D.3d 343, 830 N.Y.S.2d 133 (2007). First, in *Festa*, unlike the instant case, the exact conduct that plaintiffs claimed was protected under the State constitution had been held unprotected under US Constitution. (See Point II.A, *supra*, for the argument that the Defendants' conduct is protected under the US Constitution.). Moreover, the *Festa* court noted that the State constitution was more broadly protective of free speech, but reasoned such dancing was not protected under this more expansive standard and stated that "extending the protection to social dancing is not a simple matter." *See id* at 7474, 460.. It then held there was "no consistent, practical framework that would classify social dancing as expressive conduct while excluding other physical, athletic, or recreational activities that are arguably similar to social dancing," *id* at, 474, 460, and that the standard Plaintiffs proposed was "over inclusive; [and]. . .would significantly depart from the level of expressiveness and communication required by the federal standard," id at 474-75, 460. Here, unlike the rights claimants' in *Festa*, Defendants' argument is not "over inclusive" and is in fact "a simple matter.": Defendants conduct meets the *Johnson* standard, as applied in the State courts for protected conduct, and the application of the regulation to Defendants 'conduct violates their rights, since it is broader than necessary to achieve the government's goal. *See* Point III.B, *infra*, and cases cited therein *(People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 503 N.E.2d 492 (1986); (*People v. Aboaf*, 187 Misc. 2d 173, 721 N.Y.S.2d 725 (Crim. Ct. 2001) (Carro, J.)).

B. Applying the Anti-Mask Law to Prohibit Defendants' Wearing Balaclavas, Under the Circumstances, Violates Article I, § 8 of the New York State Constitution

The relevant standard for determining whether the state's regulation violates the New York State's free speech provision was set out in *Arcara*. The Court of Appeals stated:

> [W]hen government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose.

Arcara, 68 N.Y.2d at 558, 503 N.E.2d at 495 (emphasis added). In *Arcara*, the defendant operated a store where it sold adult books and showed sexually explicit movies; however, patrons were using the premises to engage in illegal sexual acts, including prostitution. Aware of this illegal activity, the District Attorney applied for an order closing the bookstore for a year pursuant to a provision in the State's Public Health law. The Court of Appeals held that the state did not meet its burden of showing that closing the bookstore for a year was "no broader than needed to achieve its purpose." It reasoned that the state did not attempt actions that were less restrictive on free expression, including "other sanctions, such as arresting the offenders, or injunctive relief." *Id* at 559, 492. It further reasoned that if these other, less restrictive actions had "prove[d] unavailing, then [the state's] burden would have been met." *Id.*

Similar to the state in *Arcara*, in the instant case, the People cannot meet their burden of showing that applying the anti-mask law to prohibit Defendants' wearing balaclavas is "no broader than necessary" to achieve its purpose of crime prevention and the apprehension of criminals. Also, as noted in Point II.B.1, *supra*, Defendants were engaging in a peaceful political protest and there was no indication that their conduct could be construed as lawless. Wearing the masks in this instance did not in any way

hinder the apprehension of criminals or facilitate crime prevention—thus applying the statute in this instance was certainly "broader than necessary" to achieve this purpose. Moreover, as noted in Point II.B.2, *supra*, a more narrowly tailored interpretation of the anti-mask law is certainly possible, as exemplified by Judge Carro's interpretation of the law to only prohibit masks worn "for no legitimate purpose." *See Aboaf*, 187 Misc. 2d at 183-84, 721 N.Y.S.2d at 733.

In sum, Defendants' wearing masks in these circumstances is expressive conduct that is protected under the New York State Constitution, and prohibiting their wearing the masks is "broader than necessary" to achieve the government's goal of crime prevention and detection. Thus, applying the anti-mask law to Defendants violates their free speech rights under the New York State Constitution.

CONCLUSION

For the reasons set forth above, Defendants' request that the charges under Penal Law § 240.35(4) should be dismissed.

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Respectfully Submitted,

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